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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 348

EDNA ALBRIGHT, WIDOW OF CLAYTON L. ALBRIGHT, DECEASED,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, A BODY CORPORATE, EMPLOYER AND SELF-INSURER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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FACTS.

Clayton L. Albright was employed by The Pennsylvania Railroad Company on November 17, 1942, as a Special Policeman and was assigned for duty at the Pennsylvania Railroad Produce Terminal at North Avenue and Mt. Royal Avenue, Baltimore, Maryland. His tour of duty was from 4 p. m. until midnight (R. 11). In the Produce Terminal

Yards there are fifteen or twenty tracks. There is also a long shed, on the second floor of which there are offices, and on the first floor are platforms where samples of produce are kept by merchants (R. 12).

His duties were to inspect cars in the yard, as well as cars coming into the yard to determine whether there were any seals broken, and to patrol the yard to see that no thefts occurred from the cars, which were still in the custody of the Railroad Company. There were many of the cars among the 108 then in the yard that the consignee had not yet accepted delivery of. Also to go to Mt. Vernon Yard, which is two blocks away, to examine the seals of any and all cars coming into and passing through Mt. Vernon Yard to determine if there were any seals on the cars, and if broken, to apply seals; and to patrol the yard in general, seeing that no theft was committed (R. 12-13).

William E. Albrecht is the Head Clerk at the Pennsylvania Railroad Produce Terminal, who is the Custodian of the records. The terminal is used for the delivery and reconsignment of perishable freight, mainly produce. There are, however, a few cars of merchandise loaded at the terminal. The cars that are not delivered to merchants at the terminal are reconsigned to other points outside of the state wherever there may be an advantageous market, and all of the cars coming into the terminal originate outside the State of Maryland. When a car arrives consigned to a merchant at the terminal, the railroad notifies the merchant, who in turn unloads the car (R. 14 and 15).

On Sunday, January 24, 1943, Clayton L. Albright reported for duty and sometime during the night he was injured while at work, which injury resulted in his death on February 4, 1943 (R. 4). At the time of his injury there were 108 cars, most of which were loaded interstate

ones, in the yard. As no business is transacted at the terminal on Sundays, no cars were unloaded that day, nor were any of the consignees notified of the arrival of cars that day.

There was not one iota of evidence produced by the Claimant to contradict or dispute the records offered in evidence, the testimony of Albrecht, the Head Clerk, or Lieutenant Swope.

ARGUMENT.

Employment in Interstate Commerce is where the Employee was actually engaged in Interstate Commerce, or where his duties are so closely related to it as to be practically a part of Interstate Commerce.

Under the facts in this case, which were uncontradicted, the lower court and the Court of Appeals of Maryland held that Special Policeman Albright at the time of his injury and accidental death was engaged in interstate transportation, or in work so closely connected with it as to be practically a part of it, which is also the test applied by the Supreme Court of the United States in the following case. *Shanks vs. D. L. & W. R. R.*, 239 U. S. 556.

Under the uncontradicted evidence in this case, Clayton L. Albright, deceased, was engaged in interstate commerce, and the proper action is governed by the Federal Employers Liability Act (45 U. S. C. A., Sec. 51, etc.).

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter".

In a report accompanying the bill amending the Federal Employers Liability Act, Senator Neely, from the Committee on Judiciary, explained the purpose of this amendment as follows:

> "This amendment is intended to broaden the scope of the Employer's Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.
>
> "The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or works so closely related to it as to be practically a part of it'. (Shanks v. D. L. & W. R. R., 239 U. S. 556).
>
> "In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.
>
> "As a result of the uncertainty which exists in border-line cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

"The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed". Report #661, Calendar #712, Senate, 76th Congress, 1st session, June 22, 1939, printed to accompany S. 1708.

It would thus appear to have been the intent of Congress to extend the benefit of the Federal Act to any employee, any part of whose duties was in the furtherance of interstate commerce, in order to give railroad employees a sole and uniform remedy for injuries sustained during the course of their employment.

In Robert Federal Liabilities of Carriers, Vol. 2, Second Edition, p. 1535, Sec. 796, State Workmen's Compensation Laws supersede by federal act as to injuries arising in interstate commerce:

"The Federal Employers Liability Act proceeds upon the principle which regards negligence as the

basis of duty to make compensation and excludes the existence of such a duty in the absence of negligence; but Congress intended the statute to be as comprehensive in those instances in which it excludes liability as of those in which liability is imposed. It established a rule or regulation which is intended to operate uniformly in all the states as to all employees of common carriers by railroad working in interstate commerce, and, in that field, it is both paramount and exclusive. State Workmen's Compensation Laws which provide a compensation to employees without regard to the question of the employers default or neglect, have therefore no application to employees of common carriers by railroad killed or injured while engaged in interstate or foreign commerce, even in the absence of negligence; for, when Congress legislates concerning a subject matter of interstate commerce, all state laws covering the same field are necessary superseded by reason of the supremacy of the national authority. Under the commerce clause, Congress may regulate the liabilities of common carriers and the rights of their employees arising out of injuries sustained by the latter when both are engaged in interstate commerce. The national legislative body acted upon the subject in passing the Employers Liability Act, and hence, awards under state compensation laws to employees of common carriers by railroad killed or injured which engaged in interstate commerce, are void".

This is clearly set forth in the case of Agostino vs. The Pennsylvania Railroad Company, 50 Federal Supplement, p. 726, decided July 2, 1943. The court in this case held that in an action under the Federal Employers Liability Act it is desirable procedure for parties to submit the question whether the plaintiff was employed in interstate commerce with the Act to the court in absence of a jury so as to avoid confusion at the trial; and further, that the amendment of the Federal Employers Liability Act, giving

to an employee of a carrier any part of whose duties shall be in furtherance of interstate or foreign commerce or in any way directly or closely and substantially affects such commerce and benefits the Act relating to liability of common carriers by railroad to employees should be liberally construed so as to extend protection of the Act to all employees, any part of whose duties furthers or affects interstate commerce in any way.

It is contended that the Federal Act applies in this case, and therefore, the State Workmen's Compensation Act does not apply.

The Supreme Court of the United States in the case of Hattie Mae Tiller, Executrix of the Estate of John Lewis Tiller, deceased, vs. Atlantic Coast Line Railroad Company decided on February 1, 1943 (87 U. S. Law Ed. 446), held that a recovery under the Federal Employers Act could be had. Mr. Tiller was a policeman for the railroad company. Among his duties was that of inspecting seals on cars in railroad yards to make sure that no one tampered with them. The whole question raised in that case was whether or not Mr. Tiller had assumed the risk as referred to by the 1939 amendment to the Federal Employers Liability Act. The amendment provides that an employee shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier. There was never any question but that Mr. Tiller was entitled to the benefits of the Federal Employers Liability Act and not entitled to compensation under the State Compensation Act.

Even before the amendment of 1939, the courts consistently held that patrolmen and night watchmen were engaged in interstate commerce.

In the case of Dade vs. N. Y. Central Railroad Co., 206 N. Y. S. 519; Dade was killed by gunshot while working for the railroad as a night watchman, and in that case the court held that Dade was employed in interstate commerce.

In the case of Fitzgerald vs. Great Northern Rwy. Co., 196 N. W. 657; the court held that a night watchman in a yard used for indiscriminate service was engaged in interstate commerce.

In the case of A. T. & S. F. Ry. Co. vs. Ind. Acc. Comm. of Cal., 220 Pac. 342; the court held that a watchman in a yard during a strike found shot near an interstate train was engaged in interstate commerce and the Federal Act applied.

Also, O'Brien vs. Pennsylvania Railroad Company, decided by the Supreme Court, Appellate Division, 3rd Department of N. Y., May 7, 1919, and reported in 176 N. Y. S. 390, the following will be found. This was an appeal by the Pennsylvania Railroad Company from an award made by the State Industrial Accident Commission against them, a self-insurer, in favor of Ellen O'Brien, widow of Patrick O'Brien, and in reversing the award of the State Industrial Accident, P. J. Henry J. Kellogg gave the following opinion:

> "The deceased was employed by appellant as a watchman at Piers 27, 28 and 29, North River, New York. These piers were maintained by the appellant for the receipt and delivery of freight from cars ferried across the river upon floats from points in the State of New Jersey. In the rear of the piers, running the whole length thereof, was an open space on West Street commonly known as the "farm". Overflow produce arriving at the piers was placed upon the farm, there to wait removal by consignees. The deceased

was engaged in acting as watchman for a shipment of potatoes in barrels from the State of Florida, which had arrived at the pier and had been placed upon the farm, when he was run down by a motor truck and killed. The consignee was entitled to 47 hours notice before removing the consignment. Before this time had elapsed and before the consignee had taken possession of the shipment or paid the freight charges thereon the accident happened. Within the well settled principles of law transportation of the potatoes, which was interstate, had not ended when the accident occurred—McNeill vs. Sou. Ry., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; Cleveland, Cincinnati & St. Louis vs. Dettlebach, 239 U. S. 588, 36 Sup. Ct. 177, 60 Law Ed. 453; Sou. Ry. vs. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 Law Ed. 836; Jennings vs. Clyde Steamship Co., 148 App. Div. 615, 133 N. Y. S. 298, Chalmers vs. New York Central, 175 App. Div. 239, 161 N. Y. S. 577. The case of Chicago, Burlington & Quincy Railroad vs. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 Law Ed. 941, is not in disagreement with the cases cited. In that case an employee was engaged in moving coal from the storage tracks of the consignee to the coal chutes of the consignee, the coal being in the possession of the consignee at all times during the work which was being performed by the employee at the time of his injury. The deceased in this case, having been engaged at the time of the accident in guarding an interstate shipment the transportation of which had not ceased, an award could not properly be made. The award is reversed and the claim dismissed. All concur".

In the case of Elder vs. The Pa. R. R. Co., 180 Atl. Reporter, p. 183 decided in 1935, the Superior Court of Pennsylvania held that a railroad policeman, whose general duties were to drive trespassers from the railroad tracks, over which were hauled both interstate and intrastate shipments, and to prevent thefts of merchandise on such ship-

ments, was engaged in interstate commerce regardless of the intrastate phase of the work, as duties were not separable, and hence action for accidental death of policeman while chasing trespassers from tracks was governed by Federal Employers Liability Act, and not by the State Compensation Act.

Respondent feels that this appeal is also controlled by the case of Thomas vs. The Pa. R. R. Co., 162 Md., 509 where the claimant's decedent was not as closely connected with interstate transportation. In the Thomas case a freight conductor working in local railroad yards shifting and selecting cars for future shipment out of the state (four days after accident occurred before train left) was held to be engaged in interstate commerce under a binding instruction given by the court to the jury. This court through Chief Judge Bond said:

> "The second execution, that upon which the question of the interstate or intrastate character of the work being done by the deceased arises, was to an instruction given to the jury that the work was in interstate commerce, and therefore compensation was not allowable under the state act. The general guiding principles for distinguishing between work of the one description and the other, within the meaning of the law, have been fully discussed in the recent case of Boyer vs. Pennsylvania Railroad Co., 162 Md. 328, 159 A. 909, at the January term of court, and repetition is unnecessary. The distinction, when both kinds of work are carried on by the same employees in the same yards, must frequently be narrow and difficult to draw. But, in the several decided cases in which the work being done at the time of injury has been substantially the same as that being done by Thomas at the moment, moving or going to move to the place of loading cars assigned for interstate transportation, there appears to be general agreement among courts of the country that the injury is to be classed as one

sustained in interstate commerce. Many somewhat similar cases may be found reviewed in the notes to the United States Code Annotated, title 45, pp. 148 to 153. In Moyer vs. Pennsylvania R. Co., 247 Pa. 210, 93 A. 282, this classification was given to an injury sustained in shifting a car to a yard where it would later be loaded with an interstate shipment. Another injury in shifting a car for interstate loading was so classified in Christy vs. Wabash R. Co., 195 Mo. App. 232, 191 S. W. 241. And in Jeneary vs. Chicago & Interurban Traction Co., 225 Ill. App. 122, affirmed in 306 Ill. 392, 138 N. E. 203, two empty cars were being shifted to a factory for an interstate loading, as in this case, and an injury which occurred then was likewise held to be one sustained in interstate commerce. The same conclusion on similar facts had been previously announced in Chicago Junction R. Co. vs. Industrial Board, 277 Ill. 512, 115 N. E. 647. And see Jarvis vs. Chic., B. & Q. R. Co. (1931), 327 Mo. 428, 37 S. W. (2nd) 602. And in the present case, even without the confirmation afforded by the decisions cited, we could not avoid the conclusion that a workman engaged in procuring and placing cars to receive and carry interstate shipments was engaged in interstate commerce as defined in the authorities. The entire task seems to have been only the first part of an interstate undertaking. We see no error in the ruling made the subject of the second exception".

In the case of O'Neill vs. Erie R. R., 169 N. Y. Supp. 1008, the court held where the train had been engaged in the movement of interstate freight the freight cars had been detached and placed on a side track. The caboose with the plaintiff therein was running along on a descending grade when an overtaking train collided with it, causing plaintiff's injuries. The court said at page 1009:

"The interstate transportation had not ended merely because the cars had come within the yard. The conductor had also to deliver the way-bills at defendant's

freight office, toward which he was going in the caboose, which was as much a part of the interstate transportation as was the movement over the state line".

Under the modern authorities, not only should the work that the employee was doing at the precise moment he was injured be considered in determining the question of interstate commerce but also the general nature and character of his work. Rader vs. B. & O. R. R., 108 Fed. 2d 980; Riley vs. Pa. R. R., 8 At. 2d. (Pa.) 448; Miller vs. Lehigh R. R., 9 At. 2d. (Pa.) 917; Elder vs. The Pa. R. R. Co., 180 Atl. 183, 118 Pa. Super. 137; Evans vs. U. S. R. R. Admr., 191 App. Div. (N. Y.) 704; Phila. & R. Ry. Co. vs. Polk, 256 U. S. 332; Roberts Federal Liabilities of Carriers, 2nd Ed., Vol. 2, Sec. 727, page 1372; Trowbridge vs. Kansas City R. R., 179 S. W. (Mo.) 777.

It was clearly the intention of Congress in amending the Federal Employers Liability Act to confer benefits on railroad employees which they had not heretofore enjoyed, and this has been accomplished by providing a sole and uniform cause of action under the Federal Employers Liability Act. The petitioner contends in his argument to this Honorable Court that in invoking the Federal Employers Liability Act in this case is to deprive railroad employees who are injured during the course of their employment an adequate remedy to recover for said injuries. This contention if upheld would be in effect to void the full force and effect of the meaning of the Federal Employers Liability Act as amended (1939). Nowhere does the petitioner dispute the conceded and agreed facts that at the time Special Policeman Albright was killed he was engaged in the inspection of the interstate cars at the Produce Terminal.

The petitioner states in his argument that the Court of Appeals of Maryland in deciding that the deceased was engaged in interstate commerce reached a conclusion in conflict with federal cases in which similar facts were involved, citing the following cases: Delaware L. & W. R. Co. vs. Scales, 18 Fed. 2d 73 (1927); Feeder vs. Sou. Rwy. Co. et al., 15 F. 2d 540 (1926). These cases it is respectfully submitted were decided in 1926 and 1927, respectively, before the Federal Employers Liability Act was amended in 1939, and since the amendment of the Federal Employers Liability Act was intended to broaden the scope of the Federal Employers Liability Act so as to include within its provisions any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce or shall in any way directly or closely and substantially affect such commerce be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of the Federal Employers Liability Act. It would also be noted in the petitioner's argument in which they cite the following cases in support of their contention, that the Federal Employers Liability Act does not apply in the present case before this Honorable Court.

Thomson vs. Industrial Commission, 380 Ill. 386, 44 N. E. (2d) 19 (1942), Cert. Den. 318 U. S. 755;

Feaster vs. Southern R. R. Co., et al., 15 F. (2d) 540 (1926);

Califore vs. Chicago, St. P., M. & O. Rlwy. Co., 220 Iowa 676, 263 N. W. 29 (1935);

Southern Railway Co. vs. Varnell, 222 Ala. 237, 131 So. 803 (1930), Cert. Den. 283 U. S. 852;

Grand Trunk Western Rlwy. vs. Industrial Commission, 291 Ill. 167, 125 N. E. 748 (1920);

Chicago & Alton R. R. Co. vs. Industrial Commission, 290 Ill. 599, 125 N. E. 378 (1919);

Hardy vs. Atlanta & West Point R. R. Co., 20 Ga. App. 303, 93 S. E. 18 (1917);
Chicago, Rock Island & Pacific Railway vs. Industrial Board, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916 F. 540 (1916).

All of which cases were decided before the amendment of the Federal Employers Liability Act (1939).

CONCLUSION.

In conclusion it is submitted that the petition for a Writ of Certiorari should be denied because (a) the unanimous opinion of the Court of Appeals of Maryland is in accord with the applicable decisions of this Court; (b) no clear or palpable error is set forth in the petition for Writ of Certiorari; (c) petitioner's brief does not comply with Rule 38 of this Honorable Court in that said brief is not direct and concise; (d) there is no special or important reason for the granting of a Writ of Certiorari in the present case because no new federal question is involved.

Respectfully submitted,

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Attorney for Respondent.